UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026-reg

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In the Matter of:

MOTORS LIQUIDATION COMPANY, ET AL.,

f/k/a General Motors Corp., et al.,

Debtors.

- -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

November 18, 2010

9:48 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

Debtors' Nineteenth Omnibus Objection to Claims (Tax Claims Assumed by General Motors, LLC)

Motion of General Motors, LLC to Enforce 363 Sale Order and Approved Deferred Termination Agreements against Ramp Chevrolet, Inc.

Transcribed by: Dena Page

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P R O C E E D I N G S

THE COURT: Okay, Motors Liquidation. Let me get appearances, and then I have some preliminary comments.

MR. SNYDER: Your Honor, good morning. Eric Snyder, Wilk Auslander for Ramp Chevrolet.

THE COURT: Right, Mr. Snyder.

MR. SKELTON: Good morning, Your Honor. John Skelton, Bingham McCutchen on behalf of General Motors, LLC.

MR. DAVIDSON: Good morning, Your Honor, Scott Davidson from King & Spalding on behalf of General Motors, LLC.

THE COURT: Okay, Mr. Skelton. And also, I'm sorry?

MR. DAVIDSON: Scott Davidson from King & Spalding.

THE COURT: Oh, right, Mr. Davidson. Okay, thank you very much.

All right, gentlemen, here's what we're going to do. I want to bifurcate the argument, and I want to deal with the threshold issue, first, which is whether I should enforce the exclusive jurisdiction provisions in the order and in the unwind agreement, and to defer until I can take a recess and decide that, debate as to construction of the agreement. And what I might refer to is the merits of the dispute, in particular, whether we're talking about merely enforcing the agreement as it was written, which seemingly already takes into account offsetting obligations in each direction, or whether this is, in fact, a setoff or recoupment or anything of that

character.

So on the phase one, which is what I want you to address first, I'm going to hear from each of you, initially from New GM, and then from you, Mr. Snyder, on behalf of Ramp, with an opportunity to reply and surreply.

When you do that, I have particular things that I want you to cover by the time you're done because, as you'll see, gentlemen, I have problems with both of your positions. Mr. Snyder, when it's your turn, I want you to address the underlying what I'll call exclusive jurisdiction provisions, because it seems to me that they provide in baby talk that my jurisdiction is not just to construe but also to enforce, and there's language in there which I didn't see addressed in your papers, but I might have missed it. Any other matter related thereto.

But by the same token, Mr. Skelton, when you or Mr. Davidson speak, I am wondering whether in this matter, which is the fifth or the sixth or the seventh time that New GM has come back to me looking for me to help it in its private disputes with dealers or with other nondebtors, this is an appropriate case for discretionary abstention, since I am not putting these issues in the hands of a state court judge or even a federal district judge who would be ignorant as to matters of bankruptcy law and policy and where it's at least arguable that Judge Grossman would have some advantages, both in terms of his

knowledge of the facts, and if it's not an advantage, at least he and I would be equal. Each of us knows what 553 says; each of us can read a contract; each of us can understand an assumption order; and each of us understands the bankruptcy principle that after you assume an executory contract, you take it cum onere.

So that's what I want you folks to focus on, and the phase one issues, then, will, just as I had first bifurcated it into the jurisdictional issues and the issues of the merits, we're going to bifurcate it again as to whether I do have, in the first instance, exclusive jurisdiction, which, Mr. Snyder, I think I do, but the more debatable issue as to whether I should exercise.

Mr. Skelton, I'll hear from you first. Main lectern, please.

MR. SKELTON: Good morning, Your Honor.

THE COURT: Main lectern, please.

MR. SKELTON: Oh, I'm sorry.

Good morning, Your Honor. John Skelton, again, on behalf of General Motors, LLC. Given Your Honor's outline, I will address the issue of jurisdiction, and in particular, the notion of whether or not the Court should -- discretionary abstention.

The -- reduced to its essentials, Ramp is challenging the essential terms of the bargain that was struck between New

GM and the thousand-plus dealers that were going to be offered wind-down agreements. And necessarily, what the scope of the rights and responsibilities of both New GM, as the 363 acquirer, and those wind-down dealers who accepted those wind-down agreements, what they're respective rights and responsibilities would be, going forward. I think that's an important backdrop, because when we now focus on Ramp's essential argument is that simply because it is now a Chapter 11 debtor, that that changes the rules and changes what -- how that challenge -- because reduced to its essentials, it is essentially saying whether it's a 553 defense or some other challenge, the payment provisions, paragraph 3.a, 3.b, and 3.c, that it is different from every other wind-down dealer or potentially different from every other wind-down dealer because it is a Chapter 11 debtor.

THE COURT: Don't follow you, Mr. Skelton. Can't every bankruptcy judge in the country tell whether a party is trying to disregard what a contract says?

MR. SKELTON: Well, I think so, and one of the arguments -- and we had a preliminary argument before Judge Grossman on October 27th. We had tried to ask the debtor to -- or, Ramp to defer until we got before Your Honor. They weren't willing to do that. And Judge Grossman did identify the assumption cum onere issue as an initial issue because, at least as expressed by Judge Grossman, if assumption cum onere

means assumption cum onere, you want the benefit, you want a wind-down payment, you've got to deal with all of the terms and conditions.

I had argued, and I think that when you look at paragraph 3.c of the wind-down agreement, that it is something more than setoff. And so I had argued that in order to adjudicate fully Ramp's essential challenge that it does not have to abide by -- or more importantly, that it can compel New GM to make a full wind-down payment without New GM having the ability to enforce those other provisions, that in order to adjudicate that issue, the Court would not only have to look at just bankruptcy issues and whether or not 365 applies, but then more importantly, what was the meaning of paragraph 3.c, and how important was paragraph 3.c, the pre-conditions in paragraph 3.b, to the overall bargain that was struck between the 363 acquirer New GM and those wind-down dealers.

And in that respect, Your Honor, I do think that this Court has -- is in a better position in order to assess that particular issue. Clearly, Judge Grossman understands 553. He understands assumption cum onere, and the like. But even he, on October 27, said to Mr. Snyder, if I decide your assumption cum onere, if I decide assumption means assumption and you're bound, case over. But even if I decide that, well, maybe 553 survives in some form or fashion, I then have to get to New GM's argument that paragraph 3.c means something more. And he

then acknowledged that it's likely that that evaluation of does 3.c mean something more, that that would be more appropriate for this Court because of this Court's background about the essential bargain that was struck. And so that's what I think the critical difference is between -- and why, candidly, New GM is coming back to Your Honor, because our essential argument is -- and our papers deal with the 553 and why we think that even if it applies, we still have a reconciliation right under state law and recoupment and the like, but the essential argument is that the wind-down agreements reflected a bargain, a deal between New GM, a thousand-plus dealers. This Court oversaw that process, approved those agreements, made findings that they were valid and binding, and if there is going to be an adjudication of the meaning of particular words, the meaning of particular language above and beyond those basic assumption -- or, basic assumption and basic 553 issues, then we certainly think that it should be before this Court.

THE COURT: Now, Mr. Skelton, you agree, I assume, that while I approved the unwind agreement, I didn't draft it?

MR. SKELTON: Absolutely.

THE COURT: And just as, to tell you the truth, and I'm not speaking out of school, we judges sign hundreds or thousands of orders that lawyers put in front of us, orders, unlike agreements, we have the power to change. And we sometimes do. And I take it you agree with that as well?

MR. SKELTON: Yes.

THE COURT: Okay, so do you agree or disagree with a potential corollary of those two premises that, while there is a more important interest in enforcing and construing our orders where we're the draftsmen, while there is some interest in construing the agreements that we approve, it isn't as strong as construing the orders that we enter?

MR. SKELTON: As a general principle, yes, I agree with that. I think that in the context of an order that has -- it is approving a very significant acquisition that has some very important components, one in which the -- for example, the New York State Dealer's Association was heard. They raised some issues --

THE COURT: Time out, Mr. Skelton, because I saw that in your papers, and I was surprised and, to tell you the truth, a touch offended when I saw that in your papers. I was there. I heard their argument. The New York Dealer's Association wasn't sticking up for GM dealers. It was a group of competitors who wanted to drive GM out of business. And I said that in my opinion that they were coming in as a Trojan horse claiming that they were dealers, when the last thing they were interested in was in the welfare of either New GM, Old GM, or the dealers of either one. I said that in baby talk in my 363 opinion. Am I remembering it incorrectly?

MR. SKELTON: No, you're remembering it correctly.

THE COURT: So whether or not I agreed with them or disagreed with them, it would at least seem to me that that's wholly irrelevant because on that issue, New GM and its continuing dealers and its discontinuing dealers were, for all practical purposes allies and not opponents.

MR. SKELTON: Well, I -- in a broad sense, yes. But those dealers that -- especially those discontinued dealers who had to make a determination, did they want the benefits of the wind-down agreement or did they want to pursue other rights. That's where, all of those dealers, individually and, presumably, collectively, reviewed very carefully what the proposal was in terms of the wind-down agreement, the terms, what rights they would have, how the wind-down -- what was being offered to them individually as a wind-down, how it was going to be paid through the open account -- and I don't want to get too fair afield because Your Honor has bifurcated -- but the open account, how it was going to be paid would be important, the preconditions to what they would have to do to satisfy to be able to get the full wind-down payment, twenty-five percent up front, seventy-five percent later, and then the ultimately qualifiers of that's set forth in paragraph 3.c. Knowing that they had seen those agreements, had read them, had understood them, and that Your Honor was at the very least entering an order approving them as valid and binding agreements, recognizing the -- I think the importance of the

underlying agreements to the overall transaction, those dealers certainly had an opportunity to say do I want to get on board and live with those wind-down agreements, or do I want to pursue other rights.

Here, Ramp certainly did that. It signed the wind-down agreements; it accepted the wind-down agreements. It then made some decisions regarding how it was going to operate over the next several months in terms of -- again, I don't want to get too far afield -- not paying rent and generating significant charges on its open account, and then when forced into bankruptcy by the taxing authorities, made a determination that its probably one and only asset was to assume the wind-down agreements and get whatever monies might be available pursuant to the terms of that wind-down agreement.

So in that context, Your Honor, I do think that the 363 order that did approve the underlying transaction, that did approve the -- make some findings regarding the underlying agreements, even though there may not have been significant debate or controversy about particular terms, that it certainly was a knowing agreement. And, part of those wind-down agreements had the exclusive jurisdiction provision. And why that's important, I think, and it goes to that notion of the discretionary abstention, is that even -- there were, you know, a thousand-plus dealers who were going to be offered wind-down agreements. And to the extent that -- I think it's fair to say

that some of them because they were dis -- they were all being discontinued, some of them may have financial difficulties, how their agreements would be handled post-sale, and if there were disputes about whether there were defenses or claims or challenges raised, whether it's in a state forum, and administrative forum, or, as we have here, in another federal bankruptcy court, the fact is that having a single jurisdiction that is going to retain exclusive jurisdiction to make decisions about how those agree -- what those agreements meant, how they're going to be interpreted, and how they're going to be enforced, including whether, if you assume, under 365, assumption means assumption and you take everything, or whether assumption doesn't really mean everything, and 553 may still have some applicability, and even if 553 has some applicability, is there still something else in paragraph 3.c which the introductory phrase in paragraph 3.c starts out, "In addition to any other rights of set-off" and then it goes on to talk about the qualifiers of a reconciliation, New GM being able to deduct any monies that the dealer owes to the final payment, and New GM being able to defer making a wind-down payment, if there's a competing claim, something that's still lurking in the background here, the fact that there's that multitude of decision-making is why that exclusive jurisdiction provision becomes very important.

THE COURT: I didn't interrupt you, Mr. Skelton; I

should have. Is it your position that in addition to all of the stuff that I have to do to enable Old GM to reorganize in dealing with its asbestos issues, dealing with its disclosure statement and its plan, and all of the things that I have to do for Old GM, which is my debtor, I have to be available to decide each of the hundreds of disputes whenever New GM has a fight with one of its dealers or, apparently, with its unions so that in addition to managing one case, I have to manage two, and to deal with what so far have been seven separate disputes with third parties and, if I'm to believe you, the hundreds of other dealer disputes that may be down the road?

MR. SKELTON: I can't speak to the issues about the unions because, quite candidly, Judge, that's -- I'm not familiar with that aspect of the underlying case. With respect to the wind-down agreements and the enforceability, I would certainly hope that there is not the floodgate of disputes. And I will tell you that GM has wanted to avoid having to burden Your Honor with this -- this particular dispute, and there's references in our papers to our having requested that it not be put on emergency basis and not asking the debtor to defer, but if we -- New GM does believe that it's very important to avoid potentially conflicting interpretations of what those wind-down agreements mean, and in particular, at least with respect to this particular case, the enforceability, when you look at paragraph 3 and the basic payment provisions,

thereunder, that that is an important instance where having a single court recognizing that there may be -- hopefully, there isn't, but there may be instances, and as Your Honor -- I'm not aware of all those others, but I do know that there have been that six or seven that have already come before Your Honor. New GM, at least in the wind-down agreement payment context, certainly hopes that this is not the tip of the iceberg. I don't -- I'm not aware that there's lurking out there a whole host of other cases. But how paragraph 3, and in particular, those payment qualifiers, gets interpreted and enforced, is an important issue to New GM.

THE COURT: If you answered this by saying not aware, then you can repeat that answer or make it clear that it applied to my question. How many other dealers do you have who have entered into unwind agreements and are debtors in Chapter 7 or Chapter 11 cases around the country?

MR. SKELTON: Unfortunately, Your Honor, I'm not aware of that. I don't know.

THE COURT: And you're likewise, therefore, unaware of the number who have assumed their agreements and who at least seemingly would have done so cum onere?

MR. SKELTON: Correct, I am not. I will tell you that I have represented New GM -- Old GM and New GM with respect to dealership bankruptcy matters within the northeast -- New Jersey, New York and New England -- and I'm certainly not aware

of any others in that territory. But I can't speak to -- and I apologize; maybe I should've got that information before I came to court this morning. I can't speak to the rest of the country, but I know that at least in that northeast territory, I'm only aware of one, and that would be Ramp Chevrolet.

THE COURT: Okay, continue, please.

MR. SKELTON: Well, Your Honor, I think that being cognizant of the bifurcation, I'm not really sure where the assumption cum onere argument falls.

THE COURT: I assume -- is your point that because of that, you should win before either Judge Gerber or Judge Grossman, wherever it's argued on the merits? I understand the point very well, and it's a very strong point. But the -- that's a merits issue, not a who-decides-the-issue issue.

MR. SKELTON: Well, except in this regard, is that if there was any question about where the case should be adjudicated, when Ramp made the decision to assume the wind-down agreement, that assumption, even though it now says 553 is still lurking out there and doesn't -- assumption doesn't vitiate those, assumption did bring into play paragraph 12, the exclusive jurisdiction provision. And so Ramp then made a --

THE COURT: Well, I understand that, but that's Mr. Snyder's problem.

MR. SKELTON: Well, and then the corollary to that, though, is that the basic argument that Ramp is now making is

that that assumption motion that GM didn't jump into court and object to and respond to and the like because, quite candidly, assumption usually means ratification, they're arguing now that that assumption motion, because GM didn't react, there's now been a waiver, estoppel, res judicata. And the reason why I think that's important to this first issue is that if that assumption motion was intended to be an adjudication of rights and obligations under the wind-down agreements, then that assumption motion itself should not have been, we don't think, brought before Judge Grossman, but it should have been brought here. Or --

THE COURT: Yeah, I saw that, but I would be surprised if Judge Grossman were to hold that you stepped on a crack and you're out. Paragraph 1 of your opponent's objection says that the wind-down money was defined in the motion as the full amount due to Ramp, and the full amount due to Ramp is, under the agreement, the amount that is the net balance in each direction, at least in one view, presumably yours. Or, if it's not the only view, then it's an ambiguous provision, am I correct?

MR. SKELTON: At the very least, it's an ambiguous provision because the assumption -- the first part of the assumption motion also talks about they're seeking to assume to effectuate the terms of the wind-down agreements, and Judge Grossman's assumption order, the one that ultimately got

entered, specifically qualified any payment obligation by New GM pursuant to the terms of the wind-down agreement.

THE COURT: That's hardly surprising, is it?

MR. SKELTON: So that's -- I would hope that it -- no, I don't think it should be surprising, because I think that if you assume an agreement, you're assuming everything, and you get the terms. And whatever the terms are, those are applicable. My point is that if the argument, now, is about waiver, estoppel, or jurisdiction because that assumption motion was an adjudication, I think that that adjudication, in the first instance, if the purpose of that adjudication was to challenge the enforceability of essential terms, it should have been brought here in the first instance, and not to Judge Grossman, consistent with paragraph 12. The fact that it didn't, the fact that Ramp didn't do that and, but now, is raising all of these arguments, I think, is one more reason why Your Honor should not abstain, but instead, retain the exclusive jurisdiction over this matter and make the decision both -- ultimately on the merits.

THE COURT: Okay, thank you.

Mr. Snyder, may I get your perspective, please?

MR. SNYDER: Yes, Your Honor. Thank you.

Your Honor, first I want to address certain statements by Mr. Skelton that I really see as straw men. The issue about the adjournment was when they asked to adjourn their motion

here, they wanted to do it until the Rally state pending appeal and motion was heard. It had little to do with their need to be here -- and these e-mails are annexed to my objection which was annexed to their motion as Exhibit C -- and had everything to do with the Rally proceeding. So when they asked, I have a motion to convert or dismiss hanging over my head in the Ramp case in front of Judge Grossman, I said no, because it had been scheduled, one, a month earlier, and two, Your Honor, my concern was that the wind-down agreements, by their terms, are terminated on October 31st, and I was uncertain of what the effect would have on the ability of the Ramp estate to get money of that date passed. So we said no to the adjournment, but after the hearing -- or, at the hearing, when Judge Grossman turned to Mr. Skelton in response to my sensitivity of there being inconsistent positions, which Mr. Skelton now says is a concern of GM, Judge Grossman looked him in the eye and said, "Don't put us in a box. Judges don't like being put in a box where you're asking two different judges to decide the same issue."

THE COURT: Got that right.

MR. SNYDER: And I asked Mr. Skelton, when I walked out of the court, to please adjourn this hearing until Judge Grossman made the threshold determination whether paragraph 3 is essential for him to decide the debtor's claim objection. He called me the next week and said no, that GM would not

adjourn this hearing. And so we're going forward here that the concern that GM supposedly has, them being the creator of it. They could simply have adjourned this hearing until Judge Grossman had made that threshold determination.

But you're now in the box. And with respect to Your Honor's concern about statement that this Court has jurisdiction, there's little doubt, Your Honor, that this Court has jurisdiction to construe the wind-down agreement and then to enforce it. It's Ramp's position, though, Your Honor, that there is not enforcement required of the wind-down agreement. So we can speak about the chargeback issue under state law, which we think, since that order took place before GM even took over, or before the debtor even executed the wind-down agreements, that they're not eligible for that set-off.

But if this Court does have jurisdiction over the claims objection, there's no other way to put it, Your Honor, this became an issue not because GM was so concerned about this issue, either in November 2009 or January 2010 when the order was entered, or even in July, Your Honor, when they filed their proof of claim. This became an issue because to be perfectly blunt, Your Honor, this Court's decision in Rally allowed them to, for lack of a better term, take any case that they believed was tangentially related and attempt to have this Court hear those issues on an exclusive basis.

THE COURT: But isn't that an abstention issue? Mr.

Snyder, you and I know each other well, and I also know your familiarity with Rally. But the amalgam of the language of the underlying contract and the order gives this Court exclusive jurisdiction in the first instance, and it says it in baby talk. I ruled that way in Rally; Judge Patterson, although in the context of a stay, had language in his decision which agreed with that, and that language is very broad. You're making, in essence, a policy point, not unlike the one that I raised as one of my threshold concerns at the outset of this argument, that I shouldn't be taking on hundreds of disputes between New GM and its dealers, but it doesn't go so far as to say that I don't have the jurisdiction that the combination of the agreement and the order said I have.

MR. SNYDER: Your Honor, if I may, I don't want that to be the red herring. To the extent that this Court does have jurisdiction, there are plenty of reasons -- and the Court alluded to some of them -- why this should not -- should be heard in the Eastern District. Number one, and to me, the most prominent one, is when GM filed the proof of claim in the Ramp bankruptcy, there's no dispute that they consented to the jurisdiction of that court with respect to claims --

THE COURT: With a reservation of rights. They said in baby talk, or very -- not exactly in baby talk but pretty impliedly that they had a gun to their heads and they were acting under what amounted to duress. But isn't the underlying

economics that this is, in substance, a 542 turnover without the adversary proceeding? I sometimes waive those formalities, and other judges have done likewise -- I'm thinking of Judge Drain, in particular -- when there's still due process. But it's not so much that GM's trying to get money out of you. What GM's really -- what you're trying to do is get money out of GM. You're trying to get the net balance, or maybe the total balance of the severance payment.

MR. SNYDER: In response, Your Honor, whether GM reserved its rights or not is not legally relevant, and I pointed out at least one case -- but GM pointed to none -- that a so-called protective proof of claim allows them to now say they did not effectuate a waiver by filing the claim. Ramp financ --

THE COURT: Well, there --

MR. SNYDER: I'm sorry.

THE COURT: -- there is, at least in my mind, some debate as to whether debtors can do that kind of thing to their creditors. But the more fundamental issue is that you're trying to get money out of New GM, and as far as I can tell, New GM isn't trying to get money out of your client's pocket.

MR. SNYDER: That's correct, Your Honor.

THE COURT: Continue, then, please.

MR. SNYDER: Your Honor, I laid out in the motion why I believed -- and I'm addressing this now because I see the

issues of judicial estoppel, as the Court opined on, or waiver or res judicata as being issues that the Court should address here. While it is true that we're looking for money from GM and we've been looking for it for some time, the proof of claim is what brought the issue to the forefront. We did not need to file a 542 action because what GM was looking to do -- and it says it on the face of the proof of claim -- on the top of the attachment is setoff and recoupment. So if they asserting setoff and recoupment, it's their burden to show that they've met the requirements of 553. We didn't raise that as a turnover. They raised it as a defense. That's their burden. And so when I file -- or, interpose an objection, that's a core proceeding in the Ramp bankruptcy, as the Court is aware, under 157(b)(2)(B), and that Court, Your Honor, not only has the knowledge of 553 as this Court does, but more importantly, I would suggest the knowledge of the facts of the Ramp bankruptcy case: the creditors, the interactions between the debtor, New York State, which is the secured creditor, and the issues that have come up in the last year in the Ramp bankruptcy proceeding. So to the extent that the Court would consider discretion, it's because Judge Grossman is more familiar with the Ramp bankruptcy case, which is where this came up.

And Your Honor, I believe the issues of waiver and estoppel are important for another reason. I understand GM is here now, and maybe Your Honor would suggest that the

definition of wind-down money, as it's defined in the assumption motion, they might have an out on, but there's no dispute that they waited until October to bring this to the forefront, and that's just not as an aside; that's -- the result of them waiting so long is that rights have been changed. An objection was -- they filed a proof of claim; an objection was interposed. There was a hearing; there were statements made at that hearing. And then they came into this court. And so the parties' legal positions have changed. They -- it's clear, Your Honor -- and we're all aware of Ramp -- that the reason this was -- Rally is because of Your Honor's decision in Rally. They didn't do this when either the assumption motion was made and granted -- there was a reason Mr. Skelton stated. They didn't do it in late-September when the objection was originally interposed. And they certainly didn't seek to let this Court off the hook, to be frank, by seeking a hearing prior to October 27th.

So we're now in a position where we have the same issue being confronted by two different courts. And for that reason alone, Your Honor, because Judge Grossman has not said "I'll reserve" but said he would deal with that threshold issue, that we believe the Court should abstain and let Judge Grossman decide that issue. And if he decides there is an issue that requires interpretation of paragraph 3 or any provision of the wind-down agreement, I think Judge Grossman,

as Mr. Skelton said, has made it abundantly clear that we'll be back here. But I think for that reason alone, we should allow Judge Grossman, who's already had this motion, Your Honor, since September, to hear it in the first instance.

And Your Honor, as an aside, and I'm going to bring up the issue regarding Semcrude because the Court alluded to what a contract is and what an order of the Court is. There's no doubt that the debtor entered into a contract. The issue is, after the contract is entered into, what is the effect of a subsequent bankruptcy. Can GM simply say, not only don't we have to satisfy Section 553, but we don't even have to satisfy New York State law with respect to a setoff that was out of time.

THE COURT: Well, you're getting on very dangerous ground, here, Mr. Snyder. I thought I was saying that I was going to bifurcate.

MR. SNYDER: That's fine, Your Honor.

THE COURT: But I've got to tell you, your client assumed the agreement.

MR. SNYDER: They did.

THE COURT: And you can't rewrite the agreement that's part of an assumption, and you can't take the parts of the agreement you like and disregard the portions you don't.

MR. SNYDER: I don't --

THE COURT: Now, as I said, and I think my questions

telegraphed my thinking, here, my sense is to let Judge Grossman decide that issue after I remind the world that people have to come to me first, but do you really want to be arguing that before me today?

MR. SNYDER: No, Your Honor.

THE COURT: Okay, anything else?

MR. SNYDER: I have nothing further.

THE COURT: All right, Mr. Skelton, I'll take brief reply.

MR. SKELTON: I just want to address a couple points that Mr. Snyder raised and Your Honor questioned whether it was really a turnover motion. Whether it's a turnover -- I think that that's what they're trying to do; they're trying to compel payment. And as I alluded to in my first remarks that if the compelling payment claim or challenge was going to be certain provisions or certain terms are unenforceable now, I think that is either a motion to compel turnover or a 7001 declaratory judgment which would have certainly brought to the forefront the underlying wind-down agreement challenge. Ramp didn't do that.

The issue about exclusive jurisdiction, jurisdiction, who decides was discussed in August at their disclosure statement hearing, at which point I made very clear that we thought that all of those issues should be raised in this court; notwithstanding that, Ramp chose to file a motion to

hold GM in contempt for essentially going through what it believed to be its rights under the now-assumed dealer agreement, and that so that the -- I'm sorry, the now-assumed wind-down agreement. And so the delay that Mr. Snyder is talking about was, yes, there was probably three weeks, primarily because of my schedule, and not because of anything that New GM was doing, but the response that New GM filed in response to that contempt motion was, first, this motion to have Your Honor look at it because, again, we thought that if, ultimately, the decision involved an assessment of the essential bargain struck between New GM and the wind-down dealers, that that was a question properly brought before Your Honor.

THE COURT: All right.

We're going to take a recess. I can't guarantee you folks when I'll be coming out, but I would like everybody back at 10:45.

We're in recess.

MR. SNYDER: Thank you, Your Honor.

(Recess from 10:33 a.m. until 11:46 a.m.)

THE COURT: Have seats, please. I apologize for the delay and keeping you waiting.

Gentlemen, I'm ruling that I plainly do have exclusive jurisdiction in the first instance of this dispute and that Ramp should have come to me first in connection with the

dispute over the construction of the wind-down agreement or its enforcement, including, most significantly, its desire to get amounts asserted to be due under the wind-down agreement.

But I'm also ruling that under my authority under Section 1334(c)(1) of the Judicial Code, I should abstain from the merits issues that I otherwise would be required to decide, in favor of Judge Grossman in the Eastern District of New York. The following are the bases for the exercise of my discretion in this regard.

As I noted in oral argument, the issues before me must be bifurcated and then bifurcated again. The first level of bifurcation is separating the jurisdictional and abstention issues, whether I have exclusive jurisdiction, and whether, if so, I should exercise it, from the issues involving the merits, whether Ramp assumed the wind-down agreement cum onere, whether New GM waived rights when it filed its proof of claim, when it tried as hard as it could to preserve them, whether New GM is estopped from enforcing whatever rights it has, whether it still has setoff or recoupment rights, even if the contract itself doesn't provide for a net amount that's due, and any other merits-oriented issues that I may have failed to mention.

The second level of bifurcation is, as I indicated, the separate issues of whether I have exclusive jurisdiction, in the first instance, and if so, whether I should abstain. Because of my conclusions as to the jurisdictional and

abstention issues, I don't need to address the merits. My conclusion as to exclusive jurisdiction and abstention issues follow.

As a threshold matter, I think it's absolutely clear that I have exclusive jurisdiction in the first instance and that Ramp should have come to me first. Paragraph 71 of the 363 order provided, in relevant part, "This Court retains jurisdiction to enforce and to implement the terms and provisions of this order, the master purchase agreement and each of the agreements executed in connection therewith including the deferred termination agreements in all respects, including but not limited to retaining all jurisdiction to resolve any disputes with respect to or concerning the deferred termination agreements", "emphasis on enforce", "implement", "with respect to", and "concerning". Likewise, the wind-down agreement provided in Section 7, "By executing this agreement, dealer hereby consents and agrees that the bankruptcy court shall retain full, complete, and exclusive jurisdiction to interpret, enforce, and adjudicate disputes concerning the terms of this agreement and any other matters related thereto." Emphasis on "interpret, "enforce", "adjudicate" and "other matters related thereto". I think there can be little doubt that the amalgam of these two provisions gives me exclusive jurisdiction over this controversy, and in my view, that can't be taken away by anything Ramp tried to tee up in the Eastern

District Bankruptcy Court, most significantly by forcing New GM to file a proof of claim, especially when, in economic substance, this dispute is a species of turnover action where Ramp is trying to get New GM to pay money to the Ramp estate, in contrast to New GM's trying to get money out of Ramp. And to the extent there can be any doubt, I think my previous decisions in connection with the California dealer, Rally, the Ohio dealers, and the New Orleans dealer, Leson Chevrolet, even though my decision on the merits, vis-a-vis Leson Chevrolet, was largely in Leson's favor, all make clear that these provisions can't be sidestepped by going to a preferred forum elsewhere. We can't have this structure that was established under the 363 order subverted by collateral attack.

With that said, whether I should exercise my exclusive jurisdiction, just as we bankruptcy judges don't always exercise the full extent of our 1334 jurisdiction, presents a different issue. Section 1334(c)(1) of the Judicial Code, 28 U.S.C. Section 1334(c)(1) provides, "Except with respect to a case under Chapter 15 of Title 11, nothing in this section prevents a district court, in the interest of justice or in the interest of comity with state courts or respect for state law, from abstaining from hearing a particular proceeding arising under Title 11, or arising in or related to a case under Title 11." A matter of this type, like the one I discussed in Rally, invokes my "arising in" jurisdiction because I'm enforcing an

order I entered and utilizing the exclusive jurisdiction that I caused to be retained under my earlier order.

It is clear in this district, if not also elsewhere, that a bankruptcy court has the power to abstain not just in favor of a state court, but also another federal court. See Judge Gropper's decision in Lear Corp., 2009 WL 3191369 at *3, (Bankr.S.D.N.Y. 2009). The standards for discretionary abstention are well established in this district and, in fact, were expressly discussed in my earlier published decisions in Adelphia, 285 B.R. 127, (2007), River Center, 288 B.R. 59 (2003), Casual Male, 317 B.R. 472 (2004), and Lyondell Chemical, 402 B.R. 596 (2009). As stated in the most recent of them, Lyondell Chemical, the standards for discretionary abstention under Section 1334(c), which are very similar to those applicable to discretionary remand under 28 U.S.C. 1452(b), have been articulated in slightly different ways and different cases, but generally have involved consideration of, 1, the effect on the efficient administration of the bankruptcy estate, 2, the extent to which issues of state law predominate, 3, the difficulty or unsettled nature of the applicable law, 4, comity, 5, the degree of relatedness or remoteness of the proceedings to the main bankruptcy case, 6, the existence of the right to a jury trial, and seven, prejudice to the involuntarily removed defendant.

Turning to those factors, now, 1, the effect on the

efficient administration of the bankruptcy estate. In the context this issue is here presented, it's best to consider this by stating the issue as asking what's most efficient for the bankruptcy system because keeping this case is certainly not going to help the administration in my court. Here, we have a situation where Judge Grossman knows the issues and the history of the case before him better than I do. He also knows the Code just as well as I do, and he can read a contract just as well as I can. This factor tips in favor of letting him continue to deal with the controversy, and most assuredly does not warrant my taking it away from him.

Factor 2, the extent to which issues of state law predominate. Here, of course, they don't, so this mildly -- but only mildly -- tips in favor of keeping it here.

3, the difficulty or unsettled nature of the applicable state law. Here, the state law issues are no more complex than construing the wind-down agreement and enforcing the agreement in accordance with its terms, if, as I assume, that, whichever judge does so, he'll do it basically the same way. Likewise, to the extent that the ability to construe issues of federal bankruptcy law should be considered when applying this factor by analogy, Judge Grossman's skills in this area and my own are no different. This would tip in favor of sending the matter to a state court in a case where this factor were applicable, but here, it's inapplicable for the

reasons that I just articulated.

Factor number 4 is comity. This factor tips, though mildly, in favor of respecting the comparable skills of a fellow bankruptcy judge when he's no less capable of deciding the underlying issues as I am, and I have no broad institutional needs to retain jurisdiction on my own. In a case where I did have those institutional needs, as I did in Rally, Leson, and the cases involving the Ohio dealers, comity would actually tip in favor of me keeping my exclusive jurisdiction because I would have strong institutional needs to protect. But here, I lack those needs, so therefore, comity certainly doesn't favor my keeping it, and to the contrary, it tips mildly in the other direction.

Factor number 5 is the degree of relatedness or remoteness of the proceeding to the main bankruptcy case. Here, the dispute is between New GM and a dealer, not with any of the debtors on my watch, most significantly, now called Old GM, now called Motors Liquidation Company. To the extent this controversy effects the Old GM case at all, it actually cuts against taking jurisdiction because if too many of these disputes between New GM and Old GM were to come to me -- I've had seven of them, already -- it would be burdensome for this Court and impair this Court's ability to deal with the debtors on its watch. As I indicated, there are important institutional interests in protecting the earlier orders of

this Court, especially when one tries to subject them to collateral attack, and as I noted in one of my earlier decisions, buyers of assets from Chapter 11 debtors need to have comfort that the protections for which the bargained or that otherwise were given to them when they acquired assets from the estate will continue to be honored. These concerns were important in the Rally matter and will usually call for the Court to keep the matter. But they don't do so here because of the reasons that I mentioned in part above and will amplify on now.

Here, we're only talking about construing a contract, as contrasted to construing an order, and determining the amount, if any, that's due under that contract. It also involves considering the significance of facts that are wholly or substantially unrelated to the umbrella Chapter 11 case. Thus, here, the institutional concerns aren't as strong. In this case, Judge Grossman can read and construe the wind-down agreements just as well as I can. Likewise, he's just as familiar as I am with doctrines like assuming a contract cum onere and the bankruptcy law involving rights of setoff, recoupment, and other issues related to the merits. Additionally, when we're talking about only one known entity whose situation is like Rally's, and where we have the unique facts involving its being a debtor in a case under the Code and having assumed the wind-down agreement as an executory

contract, I don't have institutional concerns as strong as they were in the cases involving Rally, the Ohio dealers, and Leson. It's just not as important that I deal with this personally.

Factor number 6 is the existence of the right to a jury trial. This factor is inapplicable as there's no right to a jury trial in either court.

Factor number 7 is prejudice to the involuntarily removed defendant. This factor, too, is inapplicable, as there here is no involuntarily removed defendant.

For the foregoing reasons, I determine that I did, in the first instance, have exclusive jurisdiction, but that upon considering the needs and concerns to be addressed in the controversy before me, it's in the interest of justice that I abstain and let Judge Grossman, who is at least as well-qualified to deal with these issues as I am, deal with them as he sees fit. Accordingly, I am yielding my exclusive jurisdiction, abstaining in this controversy, and permitting it to be determined by Judge Grossman.

This ruling, obviously, has aspects that are favorable to each of the two sides. On balance, I think it's more appropriate for you, Mr. Snyder, to settle an order in accordance with the foregoing stating, in substance, that for the reasons set forth on the record, the Court finds that it does have exclusive jurisdiction in the first instance and that Ramp should have come to this Court first, but stating further

that the Court is abstaining from the determination of the merits of this controversy and authorizing and requesting that Judge Grossman decide the remainder of the issues as he sees fit.

Not by way of reargument, are there any questions or open issues? Mr. Snyder?

MR. SNYDER: No, Your Honor.

THE COURT: Mr. --

MR. SKELTON: No, Your Honor.

THE COURT: All right, very well. We're adjourned.

MR. SNYDER: Thank you, Your Honor.

MR. SKELTON: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 12:04 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true and accurate record of the proceedings.

Dena Page

Digitally signed by Dena Page
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DENA PAGE

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Date: November 19, 2010